

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

- against -

RAPHAEL FELIZ MENDEZ,

Defendant.

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Brieant, J.

03 Cr. 718 (CLB) (LMS)
[04 Civ. 7854 (CLB)(LMS)]

Memorandum and Order

In accordance with letter brief dated May 16, 2005, this Court has directed the reference to the Hon. Lisa Margaret Smith, United States Magistrate Judge, for the purpose of holding an evidentiary hearing as to whether Mr. Mendez's attorney failed to file a requested Notice of Appeal.

All other claims in the Petition are denied at this time for lack of merit.

Specifically, there was no basis to move for a dismissal of the Indictment nor was there any investigation required. The Appeal, if, in fact, it was requested, should have been filed. The allocution taken at the time of Mr. Mendez's plea of guilty in the case shows that his plea was voluntary and given with full knowledge of his rights and the possible consequences of pleading guilty and conformed in all respects to Rule 11 of Fed. R. Crim. P.

The contention by Mr. Mendez that his sentencing was unconstitutional in light of the

Supreme Court decision in *Blakely v. Washington*, 125 S.Ct. 21 (2004) is lacking in merit. Treated as a claim under *United States v. Booker*, 125 S.Ct. 738 (2005), the claim lacks merit. Our Court of Appeals has held in *Guzman v. United States*, 404 F.3d 139 (2d Cir. 2005) that the rule of *Booker* is not to be applied retroactively to cases on collateral review. Because Mr. Mendez's conviction was final before January 12, 2005, his *Blakely/Booker* claim lacks merit.

The Court adopts the arguments and contentions set forth in the Government letter brief dated May 16, 2005 and the Petition is dismissed except for the open issue of whether the attorney failed to appeal having been requested to do so.

The Court declines at this time to make the finding contemplated by Rule 54(b)
Fed. R. Civ. P.

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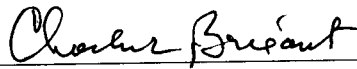
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SO ORDERED.

Dated: White Plains, New York
May 20, 2005



Charles L. Bricant, U.S.D.J.